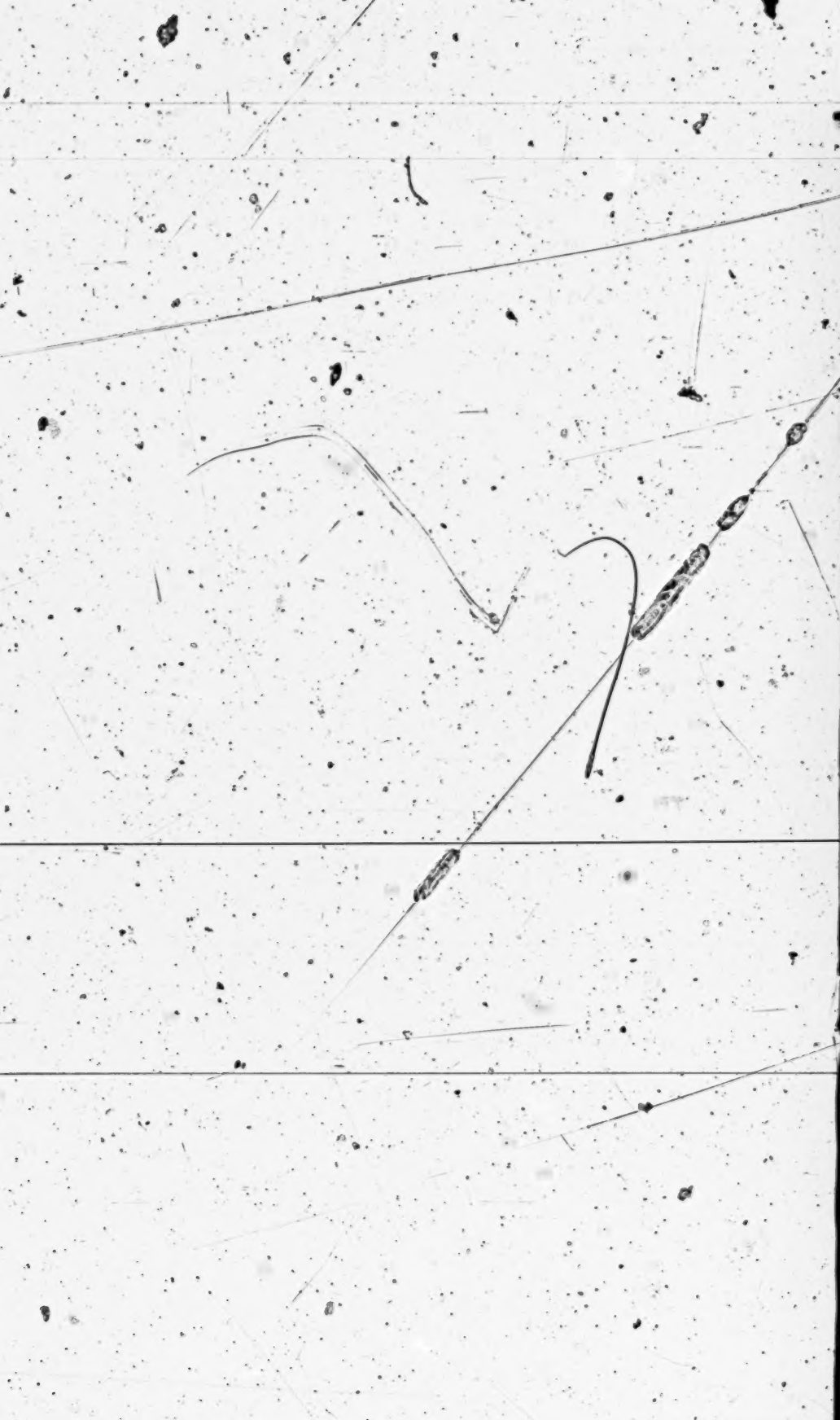

No. 533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

TORAO TAKAHASHI, *Petitioner*,

v.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman Thereof, et al.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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April 16, 1948.

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With the consent of the parties, the American Jewish Congress respectfully submits this brief, *amicus curiae*, in support of the petitioner's position in this case.

The American Jewish Congress is an organization composed of American Jews, organized in part "* * * to help secure and maintain equality of opportunity * * * and to safeguard the civil, political, economic and religious rights of Jews everywhere" and "* * * to help preserve, maintain and extend the democratic way of life."

The activities of the American Jewish Congress have never been confined to the interests of the Jewish people alone. It believes that Jewish interests are inseparable from those of justice and that Jewish interests are threatened whenever persecution, discrimination or humiliation is inflicted upon any human being because of his race or religion. The special interest of the Jewish people in human rights derives primarily from an immemorial

tradition which from the beginning has proclaimed the common origin and destiny of all mankind and has affirmed under the highest sanctions of faith and human aspiration the common and inalienable rights of all men. The struggle for human freedom is part of the substance of the Jewish tradition.

The denial by the State of California of a fishing license to a resident of the State solely because of his Japanese birth is a manifestation of racism which we consider incompatible with democratic institutions. We propose to show why we think it a violation of the equal protection clause of the Fourteenth Amendment.

Question Presented

The sole question discussed in this brief is whether Section 990 of the Fish and Game Code of California deprives petitioner of the equal protection of the laws, in violation of the Fourteenth Amendment, by its provision that "A commercial fishing license may be issued to any person other than a person ineligible to citizenship."

We believe that this provision is invalid for the further reason that it violates Federal policy, especially as embodied in the United Nations Charter (Articles 55c, 56; 59 Stat. 1046). The fundamental issue of the impact of this policy upon state discriminatory practices has been presented to this Court in the pending cases involving the enforceability of restrictive covenants. *J. D. Shelley* v. *Louis Kraemer*, Oct. Term, 1947, No. 72; also Nos. 87, 290 and 291. The relevance of that issue here is clear. See concurring opinions of Justices Black and Murphy in *Oyama* v. *California*, 92 L. Ed. 257, 266, 278. However, we will not dwell further on that subject, as we believe that the equal protection clause alone requires reversal of the present judgment.

Statement

Petitioner filed a petition in the Superior Court of the State of California for Los Angeles County for a writ of mandamus ordering the respondents, members of the Fish and Game Commission of the State, to issue to him a commercial fishing license. The petition alleged that petitioner was born in Japan; that he is, and since 1907 has been, a resident of Los Angeles and of the United States; that he is a commercial fisherman and has engaged in that occupation in California since 1915; that a commercial fishing license had been issued to him annually from that date until 1941; that he had been evacuated from California in 1942, but returned in 1945 to resume his former occupation; that he had qualified to obtain a commercial fishing license under the statute in every respect, except only that he is an alien of Japanese descent; and that he has no other occupation and has been unable to secure other employment (R. 1-2).

The petition further alleged that respondents refuse to issue a license to petitioner solely because of his Japanese ancestry and because of the provisions of Section 990 of the Fish and Game Code. It challenged the constitutionality of that section under the California Constitution and under the due process and equal protection clauses of the Fourteenth Amendment (R. 2).

Respondents filed an answer containing a demurrer, a denial that the license had been refused because of petitioner's Japanese ancestry, and an allegation that petitioner is not qualified for a license because he is a person ineligible to citizenship (R. 3-4).

The case was heard on the pleadings. The Superior Court filed an opinion (R. 11-18), in which it held the statute unconstitutional insofar as it denied to aliens ineligible to citizenship the right to fish upon the high seas for profit and to bring the catch to the California shore for sale. It ordered the issuance of a writ commanding

respondents to issue to petitioner a commercial fishing license "authorizing him to bring ashore in California, for the purpose of selling the same in a fresh state, his catches of fish from the waters of the high seas beyond the State's territorial jurisdiction" (R. 7).

After the respondents appealed to the Supreme Court of the State, the Superior Court amended the judgment by removing the limitation to fish caught beyond the territorial jurisdiction of the State and ordered the issuance of a peremptory writ commanding the issuance to petitioner of a commercial fishing license under Section 990 (R. 21, 22).

In the State Supreme Court both parties sought a decision on the merits of the amended judgment and the Court (although it declared that judgment void because filed after the appeal had been perfected) considered the appeal from it as a "special order made after final judgment" (R. 33-34). It upheld the constitutionality of the statute as applied both to fish caught within the territorial waters of the State and to those brought to the shore from the high seas (R. 30-45). Three of the seven justices dissented (R. 45-53).

The Opinions Below

The Superior Court found in the statute an unconstitutional discrimination between aliens eligible to citizenship and ineligible aliens with respect to the lawful trade of bringing into the State fish caught on the high seas. In this aspect, the Court said, the State was not dealing with the disposition of its own property. Further, it found in the legislative history of the statute an obvious purpose to eliminate Japanese aliens from commercial fishing (R. 11-18).

The majority of the Supreme Court upheld the statutory classification "in view of the application of the presumption of constitutionality to legislation of this kind,

and because of the broad powers of the legislature in regard to the ownership, regulation and protection of wildlife" (R. 39). It declared that petitioner had not established with any certainty that the legislature had intended to discriminate against the Japanese alone (R. 39-41). Application of the statute to fish caught beyond coastal waters was upheld as within the police power, as a means of making effective the State's policy with respect to the conservation and distribution of its common property (R. 42-45).

The dissenting opinion declared the issue to be "whether an alien resident may be excluded from engaging in a gainful occupation—from working—making a living" (R. 45). It quoted at length from this Court's opinion in *Truax* v. *Raich*, 239 U. S. 33, in support of the view that this right may not be denied (R. 46-48). It found no reasonable basis for the classification of applicants for licenses on the basis of either alienage or eligibility to citizenship (R. 48-53). Finally, it found "highly persuasive arguments" that the statute is aimed solely at Japanese (R. 53).

Summary of Argument

The legislative history of Section 990 and facts of common knowledge which have been reviewed in recent opinions of this Court make it plain that the sole purpose of the provision here in question was to deprive alien Japanese of the right to earn their living in the common occupation of fishing. This is a denial of the basic constitutional right which this Court upheld in *Yick Wo* v. *Hopkins*, 118 U. S. 356, and *Truax* v. *Raich*, 239 U. S. 33.

The statute is not aided, as the Court below thought, by the presumption of constitutionality. Statutes which discriminate against particular minority groups, and especially those directed against aliens who cannot vote, are subject to "searching judicial inquiry" and can be upheld only under "the most exceptional circumstances."

The "proprietary" power of the State over the fish in its waters does not support the statute. Even if its application were limited, as it is not, to the taking of fish from the State's territorial waters, that power is subject to the basic constitutional limitation that it may not be used as a subterfuge to accomplish an unconstitutional purpose.

Even if the patent intention to discriminate solely against the Japanese is disregarded, the classification of residents of the State on the basis of either alienage or ineligibility to citizenship for the purpose of withholding fishing licenses is an arbitrary one, having no rational relation to the professed purpose of the statute and hence violates the equal protection clause.

Whatever defense may be advanced for the statutory classification as applied to the taking of fish from the State's territorial waters, the discrimination which it makes is plainly invalid as applied to the bringing ashore of fish caught on the high seas. While the State may apply genuine conservation measures to that activity, it may not compound its own power by extending in the exercise of the "police power" a discrimination which has its only conceivable justification in the fact that it is exercising a "proprietary power."

I

Section 990 contains an unconstitutional discrimination againt the Japanese residents of California solely by reason of their national origin.

The State of California issued commercial fishing licenses to petitioner annually from 1915 to 1941. The first statutory bar to the granting of a license to him was introduced in 1943, when Section 990 of the Fish and Game Code was amended to provide that "A commercial fishing license may be issued to any person other than an alien

Japanese." In 1945 this sentence was amended by eliminating the reference to "alien Japanese" and substituting therefor "a person ineligible to citizenship."

The history of this 1945 amendment is set forth in the opinion of the Superior Court in this case (R. 17). A Senate Fact-Finding Committee on Japanese Resettlement created in 1943 filed its report on May 1, 1945. Under the heading "Japanese Fishing Boats" that report contains the following paragraph:

> "The committee gave little consideration to the problem of the use of fishing vessels on our coast owned and operated by Japanese, since this matter seems to have been previously covered by legislation. The committee, however, feels that there is danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship.
>
> The committee has introduced Senate Bill 413 to make this change in the statute."

Senate Bill 413, as introduced by this committee, was enacted in 1945.

The majority opinion of the State Supreme Court states that "it may be inferred" that, by this amendment, "the legislature desired to extend conservation measures and did not rewrite the statute for the purpose of discriminating against alien Japanese" (R. 40). In view of this statement it seems appropriate to look at the other subjects covered in the Senate committee's report. The other section headings are "Alien Land Law", "Japanese Language Schools", "Dual Citizenship", and "Tulelake Riot". The committee's recommendations, listed in the conclusion of the report, included proposals for strengthening the Alien Land Laws and their enforcement, and for regulation of Japanese language schools. The concluding sentence reads:

> "The committee is vigorously opposed to the return of any Japanese to California until after the end of the war with Japan."

On the present subject the committee stated its conclusion as follows:

> "The *Japanese fishing bill*, in the opinion of the committee, does not require extensive revision, but should be modified to apply to aliens ineligible to citizenship rather than to refer specifically to Japanese." (Italics added.)

Against this background we are confident that this Court will recognize the present statute for what the California legislature intended it to be—a means of keeping the Japanese out of the fishing business and not a conservation measure. The case was decided in the State court before this Court handed down its decision in *Oyama* v. *California*, 92 L. Ed. 257. The opinions in that case leave no room for doubt that the patent subterfuge of the statutory classification of ineligible aliens as a separate group for the purpose of regulating fisheries must be disregarded.

The statute in its original form was directed against the Japanese expressly. In that form it seems clear that the court below would not have attempted to defend it as a conservation measure. The amendment which put it into its present form was motivated solely by a desire to make the original measure effective. Not fish or conservation, but the Japanese alone, were the sole concern of the committee which introduced the amendment and of the legislature which enacted it exactly as it was introduced. The "Japanese fishing bill", as the committee called it, was designed solely to deprive the Japanese residents of the State of the opportunity to earn their living in the common occupation of fishing. The decisions of this Court leave no room for doubt that such legislation violates the equal protection clause.

Truax v. *Raich*, 239 U. S. 33;
Yick Wo v. *Hopkins*, 118 U. S. 356.

The contention that in spite of this history the statute must be viewed as a bona fide regulation of the State's fisheries requires a naïveté which this Court has consistently refused to display. The situation may be compared to that presented by the Chinese Bookkeeping Act in the Philippines. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500. In holding that Act invalid Chief Justice Taft said (514):

> "Nor is there any doubt that the Act as a fiscal measure was chiefly directed against the Chinese merchants. The discussion over its repeal in the Philippine legislature leaves no doubt on this point."

See also *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 85, where Mr. Justice Holmes described a State statute as "a bill of pains and penalties disguised in general words." That the present statute is aimed solely at the Japanese is even more apparent, if that is possible, than in the case of the alien land laws, of which Mr. Justice Black says (*Oyama* v. *California*, 92 L. Ed. at 265):

> "That the effect and purpose of the law is to discriminate against the Japanese because they are Japanese is too plain to call for more than a statement of that well-known fact."

Certainly the presence in the State of a few non-Japanese aliens who are ineligible to citizenship is as immaterial as was the fact in *Yick Wo* v. *Hopkins, supra*, that the Commissioners had denied a laundry license to one non-Chinese applicant.

The purpose and effect of the present statute is to deny the petitioner "the right to work for a living in the common occupations of the community" which this Court declared to be "of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure." *Truax* v. *Raich, supra*, 233 U. S.

at 41. Accordingly, we turn to the considerations advanced by the court below in an effort to avoid the force of that decision.

II

The presumption of constitutionality is inapplicable to measures directed against racial or national minorities.

The presumption of constitutionality was invoked by the majority of the State Supreme Court. After declaring that a legislative classification will be upheld "unless it is palpably arbitrary", the opinion referred to the "only possible limitation upon this rule" as that "where the legislation attempts to restrict fundamental liberties" (R. 36). This statement is followed by the citation of *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152. That opinion, we submit, and the cases which have followed it, completely refute the proposition for which it is cited. In the often-cited footnote in the *Carolene* case, to which the Court referred, Chief Justice Stone suggested, but found it unnecessary to decide, whether legislation which restricts the political processes that are normally relied upon to bring about the repeal of undesirable legislation "is to be subject to more exacting judicial scrutiny under the general prohibition" of the Fourteenth Amendment than most other types of legislation. He then proceeded to pose the question which is directly pertinent here:

> "Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religions, • • • or national • • • or racial minorities • • • whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

To this question later decisions of this Court have given an unequivocal affirmative answer.

> *Hirabayashi* v. *United States*, 320 U. S. 81, 100;
> *Korematsu* v. *United States*, 323 U. S. 214, 216;
> *Oyama* v. *California*, 92 L. Ed. 257, 264;
> *Cf. Pearl Assurance Co.* v. *Harrington*, 38 F. Supp. 411, 413, aff'd 313 U. S. 549.

In the last of these cases Mr. Justice Frankfurter in the District Court, cited the footnote quoted above from the *Carolene* opinion in support of the statement that "We do well to scrutinize legislation that avowedly discriminates against aliens." In the other three cases the discriminations which were under consideration were directed against citizens based upon their Japanese ancestry. In *Oyama* the Chief Justice wrote:

> "There remains the question whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause . . ."

The present discrimination is directed against a particular group of individuals who are not citizens and who cannot at this time become citizens. Politically that group, because it has been denied both the right to vote and the hope that it will be able to vote in the future, is the weakest in the population. For the reason given by Chief Justice Stone in the *Carolene* case, *supra*, they are in need of a "correspondingly more searching judicial inquiry." That need is made even more acute by the record of hostility, fanned by the war, which is written in the recent reports of this Court. In the present case the inquiry goes to the extent of the State's extraordinary power over its natural resources and the constitutional limitations upon the exercise of that power.

III

Section 990 may not be upheld under the "proprietary" power of the State over the fish in its waters. That power is subject to constitutional limitations and may not be used as a pretext for discrimination between residents of the State on racial grounds.

We shall not consider the effect of the decision in *United States* v. *California*, 332 U. S. 19, on the State's authority over fish within the three-mile limit. That issue is now pending before this Court. *Toomer* v. *Witsell*, October Term, 1947, No. 415. We shall assume, *arguendo*, that for purposes of fish conservation those waters are to be considered territorial waters of the State.

The court below appears to have taken the view that the broad power of the State over fish and game is subject to virtually no constitutional limitation. It quoted with approval the statement in *Lubetich* v. *Pollock*, 6 F. (2d) 237, 240, that "the state owns the food fish in the waters over which it has jurisdiction, the same as any other proprietor owns property", and that its power "arises out of and is incidental to the ownership of the property."

We submit that this view of the State's power is contrary to this Court's declarations on the subject, and that it has been applied to reach a result which cannot be supported by any decision of this Court. The classic statement which has often been repeated is that of Mr. Justice White in *Geer* v. *Connecticut*, 161 U. S. 519, 529:

> "Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the

government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin* v. *Waddell*, 41 U. S., 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty.

This conception that the State's power must be exercised like all other powers of government as a trust for the benefit of the people" can mean only that constitutional limitations exist, determined as in all other cases by the courts. In the several cases, like the *Geer* case, which have upheld the extraordinary power of the States to regulate wild life in a manner that would not be permissible where other types of property were involved, there is implicit in this Court's opinions a recognition of the applicability of certain constitutional limitations. Those cases afford illustrations of an extraordinary power to control a particular species of property. They furnish no support for the proposition that that power may be utilized to discriminate against lawful residents of the State in a manner that is wholly unrelated to the faithful performance of the State's trust for the benefit of its people. In the *Geer* case, for example, it was held that the commerce clause does not invalidate a statute prohibiting the possession of game for the purpose of transporting them outside of the State. *McCready* v. *Virginia*, 94 U. S. 391, held that the privilege of planting oysters in the waters of the State is not one of the privileges and immunities which Article IV, Section 2, guarantees to citizens of other States.* *New York ex rel. Silz* v. *Hesterberg*, 211 U. S.

* The extent of permissible discrimination against non-residents of the State is involved in *Toomer* v. *Witsell*, Oct. Term 1947, No. 15, now pending in this Court. See *Pavel* v. *Pattison*, 24 F. Supp. 15; *Pavel* v. *Richard*, 28 F. Supp. 992. These cases involve the question of the power of the State to impose limitations on the doing of business by non-residents. That issue is a very different one from that of the State's power to discriminate among its own residents regarding their participation in a common occupation.

31, held that it is consistent with the due process clause and the commerce clause for a State to prohibit the possession, during the closed season, of game birds even though they had not been taken or killed within the State. It is obvious that the statutes upheld in these cases were all reasonably adapted to the legitimate purpose of making effective the State's policy of conserving its natural resources for its own people. The designation of the State's power as a "proprietary" one did not remove all constitutional questions. It merely served to define the public interest against which the individual's assertion of a constitutional right was weighed.

This application to conservation measures of the usual process of constitutional adjudication is even more apparent in the more recent cases. In *Lacoste* v. *Department of Conservation*, 263 U. S. 545, a Louisiana statute imposing a severance tax upon skins and hides taken from wild fur-bearing animals, was upheld as "a valid exertion of the police power of the state to conserve and protect wild life for the common benefit" (550). This Court found it unnecessary to consider whether the tax might be upheld by virtue of the State's power to prohibit the removal of wild game. Although that power was asserted by the State, the opinion contains an emphatic assertion of this Court's function in passing upon the constitutional issue, which in that case happened to have arisen under the commerce clause. The Court wrote (550):

> "This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description, or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form."

The same approach appears under the equal protection clause in *Patsone* v. *Pennsylvania*, 232 U. S. 138. In

upholding the Pennsylvania statute, which made it unlawful for any unnaturalized foreign-born resident to possess a shotgun, Mr. Justice Holmes adopted the approach which he consistently applied to cases arising under the Fourteenth Amendment. He regarded the prohibition as obviously related to the lawful object of protecting wild life and the discrimination against aliens as conceivably based upon a knowledge of local conditions as to the peculiar source of the evil which the legislature desired to prevent.

The *Patsone* case is the only one in this Court dealing with the State's power over wild life which has upheld a discrimination against residents of the State based upon their non-citizenship. The decision was not grounded upon the concept that the State was acting with the prerogatives of a private property owner. Any attempt to justify the decision under that power must face the significant fact that there was a dissent by Chief Justice White, who had written the opinion in *Geer* v. *Connecticut, supra.* Its rationale is exactly that of the later decision in *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392, upholding an ordinance which barred aliens from operating poolrooms. We do not believe it necessary, for the purpose of this case, to dwell upon our doubts as to the soundness of these decisions, for we think it clear that though the rule of the *Patsone* case be accepted, it affords no support for the present statute.

For all that appears in the *Patsone* opinion, the activity from which aliens were barred was that of hunting for sport. The discrimination in the earning of a living, which this Court shortly thereafter declared unconstitutional, *Truax* v. *Raich,* 239 U. S. 33, was not in issue. There can be no dispute that the interest for which the present petitioner seeks constitutional protection is of a much more fundamental character than that which Patsone sought to protect. The reports of the California Bureau of Marine Fisheries, which are cited in the brief filed by petitioner's counsel and the statistical data quoted from those reports, show conclusively that California by its

licensing legislation is not attempting to keep fish within its waters but to promote and indeed to expand an important commercial business. Petitioner is not seeking to share in the enjoyment of property which the State has elected to retain for its own citizens but to participate in that business on the same basis that is open to all other persons, whether residents of the State or non-residents, citizens or non-citizens.

We need not consider whether, even under Mr. Justice Holmes' approach, the State should be permitted to draw a line, not between citizens and non-citizens, but between a particular group of non-citizens and all other persons. Certainly, such a line of distinction must tax the most extreme deference to the supposedly superior knowledge of the State legislature about local conditions. In the last analysis the decision in the *Patsone* case rests upon the presumption of constitutionality. We have shown (Point I) that later opinions of this Court create almost an exactly opposite presumption in cases where the statute patently discriminates against a minority national or racial group. Here no "searching judicial inquiry" is required to reveal the State's purpose to use the supposed power over its natural resources to deprive a particular stigmatized group of the State's residents of an opportunity to participate in one of the State's important commercial enterprises. Facts of common knowledge, which are fully reflected in this Court's opinions in the *Hirabayashi, Korematsu* and *Oyama* cases, compel recognition that Mr. Justice Holmes' extreme display of judicial deference to the legislative judgment about local conditions is wholly inappropriate in the present situation.

That the State's "proprietary" power over natural resources may not be used as a subterfuge for the deprivation of constitutional rights is shown by this Court's decisions that it was error to deny temporary injunctions against the enforcement of the Louisiana Shrimp and Oyster Acts. *Foster Fountain Packing Co.* v. *Haydel,*

278 U. S. 1; *Johnston* v. *Haydell*, 278 U. S. 16. These acts were ostensibly passed for the purpose of preserving natural resources to the State's inhabitants. The Shrimp Act made it unlawful to export shrimps from the State from which the heads and hulls had not been removed. This Court upheld the claim that the statute was a subterfuge designed to compel the removal of a canning plant from Mississippi to Louisiana and thereby directly to obstruct and burden interstate commerce. It wrote (13):

> "The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the state necessarily releases its hold, and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trust upon which the state is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause. They are not bound to comply with, or estopped from objecting to the enforcement of, conditions that conflict with the Constitution of the United States."

Although a different constitutional provision is here invoked, the analogy is clear between the *Foster Fountain* case and the present one. The purpose of the California legislation is not to retain the fish or to prevent it from becoming an important article of commerce, both local and interstate. The supposed power to act as a private owner, free of constitutional limitations, has been invoked for the ulterior purpose of depriving a small proportion of the State's population from the opportunity to participate in that commerce. The manner in which that small group has been selected is as obviously a viola-

tion of the equal protection clause as was Louisiana's attempt to monopolize shrimp canning a violation of the commerce clause. The attempt to impose an unconstitutional condition upon the grant of a right which the State might theoretically withhold altogether must be stricken down in the present case, just as it was in the Louisiana cases.

The fallacy of the State's argument to the contrary has been most forcefully presented by Professor Thomas Reed Powell, in criticism of this Court's decision in *Heim* v. *McCall*, 239 U. S. 175, upholding the exclusion of aliens from employment on public works. T. R. Powell, *The Right to Work for the State*, 16 Columbia Law Review 99. Professor Powell wrote (111, 112):

> "Logically, a thing which may be absolutely excluded is not the same as a thing which may be subjected to burdens of a different kind, even though such burdens would be regarded by all as less onerous than the burden of absolute exclusion. The 'power of absolute exclusion' is a term not identical with the 'power of relative exclusion' or the 'power to impose any burdens whatsoever.' * * * The fact that the right of the state to exclude some by excluding all is not denied by the due process clause has no bearing upon the question whether the right to exclude some but not all is denied by the equal protection clause."

The logic of Professor Powell's argument has been applied in many varied situations. Perhaps the most important, historically, is the line of decisions holding invalid the imposition of unconstitutional conditions upon the grant of authority to foreign corporations to do business in a State. This analogy was plainly recognized by this Court in the *Foster Fountain Packing Company* case, *supra*, where the Court cited *Power Manufacturing Company* v. *Saunders*, 274 U. S. 490, and *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, cases in which the equal protection clause was successfully invoked by the foreign corporations. The grant of a legal education is not a right which the due process clause requires the State

to offer, but when it is offered, the equal protection clause prohibits the maintenance of discriminatory conditions based upon race, creed or color. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sipuel* v. *Board of Regents of University of Oklahoma,* decided January 12, 1948. In *Hannigan* v. *Esquire,* 327 U. S. 146, 156, this Court cited the dissenting opinions of Justices Brandeis and Holmes in *United States ex rel. Milwaukee S. D. Pub. Co.* v. *Burleson,* 255 U. S. 407, 421-3, 430-2, 437, 438, in pointing to the grave constitutional questions posed by the exercise of censorship through the denial of the second class mailing privilege, a subsidy which Congress is certainly free to withhold from all.

There is nothing new about the present attempt to invoke the theoretically complete power of the State over a particular subject as a guise for the denial of constitutional rights to the Orientals in California. Following the first flood of Chinese immigration a deliberate, undisguised effort was written into the California Constitution to drive the Chinese out of the State. See *In re Triburco Parrott,* 1 Fed. 481, and *In re Ah Chong,* 2 Fed. 733. The Constitution of 1879 contained the following declaration (Art. 19, Sec. 4):

> "The presence of foreigners, ineligible to become citizens of the United States, is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all the means within its power."

The *Parrott* case held unconstitutional an act passed pursuant to this provision which made it a crime for a corporation to employ any Chinese or Mongolian. The reserved power of the State over the corporate charters was unsuccessfully invoked in support of this statute. The *Ah Chong* case declared invalid a statute passed at the same time which prohibited "all aliens incapable of becoming electors of this state from fishing." This statute was defended under *McCready* v. *Virginia,* 94 U. S. 391, as a

mere denial of a privilege which the State could withhold. The Court rejected this defense and held the statute invalid under both the Treaty with China and the equal protection clause. Conceding the power of the State to exclude all aliens from fishing, it was held that the privilege could not be denied to Chinese while it was granted to other aliens. After so holding, Judge Sawyer continued (2 Fed. at 737):

> "It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes *in pari materia* referred to, considered in connection with the public history of the times, that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. The end to be accomplished being unlawful, as we held in Parrott's case, it is unlawful to use any means to accomplish the unlawful object, however proper the means might be if used in a proper case and for a legitimate purpose."

The present effort by the State of California to deprive the Japanese of the opportunity to earn a livelihood by every constitutional pretext that can be found in the decisions of this Court is considerably more sophisticated than the measures directed against the Chinese during the last century. This Court does not permit such sophistication to whittle away basic constitutional rights. See *Lane* v. *Wilson*, 307 U. S. 268, 275.

IV

Even if the State's purpose to discriminate against the Japanese alone be disregarded, the statutory discrimination against aliens ineligible to citizenship must be held to deny petitioner the equal protection of the laws.

Even if the purpose to single out the Japanese for discriminatory treatment is to be ignored and the statutory language is to be read in the abstract, with that blindness to the surrounding circumstances for which the State apparently contends, the State's case is no stronger. The applicable rule under the equal protection clause was accurately stated in the opinion of the court below (R. 35):

> "The rule is that the classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished."

Assuming the "legitimate object" here to be the conservation of the State's natural resources, we think it plain that there is no rational relation between the accomplishment of that object and the classification of the State's residents based upon either citizenship or eligibility to citizenship. The point was made in the dissenting opinion below in a manner which we consider to be unanswerable (R. 49-51):

> "There is no sound basis for the argument that because the fish and game belong to the people of the state, the taking of them may be prohibited to all, and that with such a broad power any group of people may be arbitrarily excluded from the right (fol. 103) to take any portion thereof. On the basis of that reasoning the Legislature could validly prohibit persons ineligible to citizenship from using the highways. They belong to the state and the traffic hazards would be less if fewer people were using them. The same is true of the use of the parks, schools and other public buildings and places. It could be argued that they

are overcrowded and the more people using them the greater the cost to the public, all to the diminishment of the resources of the state natural or otherwise. While the state may withhold a privilege if it elects not to grant it, it cannot arbitrarily prevent any member of the public from exercising it while granting such privilege to others. To conclude otherwise would deprive the equal protection principle of all meaning. If aliens are to be given equal protection, and they must, then to put them all in a class by themselves is to refute the very premise of the doctrine. Manifestly there is no rational basis for the classification. When the lack of a proper ground is patent on the face of legislation, proof of its lack of rationality is unnecessary. Suppose a statute declared that red headed persons could not engage in certain occupations. Plainly a red head could not prove there was no possible reason why the public welfare is more jeopardized by having red heads than others in those callings. He would simply say all that any one could say: 'That such a classification is pure nonsense,' and 'here is not a court in the land that would not agree with him.

• • • •

"Even if we assume that aliens as such may be excluded from some vocations or pursuits, yet *there is no conceivable basis for discrimination between different classes of aliens.* In the instant case *not all aliens* are shut out of commercial fishing. It embraces only those 'ineligible to citizenship' (fol. 105). Other aliens may follow that enterprise. Thus we have at least one complete answer to the proposition that because the fish are owned by the people of the state (people being used in the sense of a citizen of the state and aliens are not citizens) all non-citizens may be excluded from taking the fish. That reasoning requires the exclusion of *all* aliens. It furnishes no justification for excluding some aliens and not others. The majority opinion suggests no possible basis for such classification and I do not believe there is any. Such a classification is based upon a mere ipse dixit and nothing more."

In support of the classification based on eligibility to citizenship, the majority opinion below cited *Terrace* v.

Thompson, 263 U. S. 197. We shall not here reargue the constitutionality of the alien land laws. We believe that the cases upholding them were wrongly decided, as four Justices of this Court declared in the *Oyama* case. That issue need not be decided here, for the present statute is plainly distinguishable. The distinction, in fact, was made in this Court's opinion in *Terrace* v. *Thompson, supra*. After restating the holding of *Truax* v. *Raich, supra*, that the right to work for a living in the common occupations is a part of the freedom which the Fourteenth Amendment secures, Mr. Justice Butler wrote (263 U. S. at 221):

> "In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The quality and allegiance of those who own, occupy, and use the farm lands within its borders are matters of highest importance, and affect the safety and power of the state itself."

Plainly there is no such relation to the "safety and power of the state itself" in the identity of the individuals engaged in commercial fishing that was asserted to exist in the "privilege of owning or controlling agricultural land." The transitory character of the petitioner's occupation stands in sharp contrast to the permanence of the relationship to the community that is assumed when agricultural land is acquired. If that relationship can be thought to give the State a special interest in the ownership of land, no similar interest can be found regarding the status of the individuals engaged in the fishing business. The pursuit of that business stands on no different footing from the standpoint of the participant's devotion to the State than does the "common occupation" of the cook whose constitutional right was vindicated in *Truax* v. *Raich, supra*, or the laundryman who was upheld in *Yick Wo* v. *Hopkins, supra*. It is axiomatic that a classification may be valid for one purpose and unconstitutional

when applied to an entirely different field. While the State's adoption of the federal standard of eligibility to citizenship was upheld in the alien land law cases, a classification based on citizenship was held in *Truax* v. *Raich*, *supra*, to bring the State's statute "into hostility to exclusive federal power." The present case, we submit, is controlled by the holding in *Truax* v. *Raich*, *supra*, that "reasonable classification implies action consistent with the legitimate interests of the state" (239 U. S. 42).

We believe that the classification which California has adopted has brought its action "into hostility to exclusive federal power", although we are not arguing that point. For present purposes it is sufficient that no legitimate interest of the State can reasonably be thought to be advanced by the present discrimination against residents merely because they are ineligible to citizenship.

V

Whatever power the State may have over fish caught in its territorial waters, application of the statutory discrimination to the bringing ashore of fish caught on the high seas is plainly unconstitutional.

To this point we have considered the present case on the assumption most favorable to the State—that the statute relates only to the taking of fish in waters over which the State has territorial jurisdiction. The statute is not so limited. It requires a license from every person who brings or causes fish to be brought ashore at any point in the State for the purpose of selling it in a fresh state. The effect of the decision below is to prohibit the petitioner not only from fishing in California waters, but also from bringing to the shore fish caught on the high seas.

It is, of course, well settled that measures genuinely directed at conservation may constitutionally be applied

to all fish brought to the State's shores. *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422. The doctrine of that case, based on the practical necessity for the regulation in order to make effective a purpose admittedly within the State's power which could otherwise be evaded, is not confined to measures for the protection of natural resources. Compare *Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Booth* v. *Illinois*, 184 U. S. 425. Application of that doctrine in the present situation, however, results in a destruction of basic constitutional rights for which there is no conceivable justification.

This part of the statute was upheld by the court below, not under the State's "proprietary" interest in the fish, but as an exercise of the "police power" (R. 42). Having reached the conclusion that the statute is valid as to fish caught within the State's waters, its application to all fish brought to the shore is held necessary to make effective the measure which it had previously held justified only under the "proprietary" power. A very similar argument was advanced by the State in *Oyama* v. *California*, *supra*, where it was explicitly rejected. The Chief Justice there wrote (92 L. Ed. at 264-265):

> "The only justification urged upon us by the State is that the discrimination is necessary to prevent evasion of the Alien Land Law's prohibition against the ownership of agricultural land by ineligible aliens * * * But assuming, for purposes of argument only, that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it. In the light most favorable to the State, this case presents a conflict between the State's right to formulate a policy of landowning within its bounds and the right of American citizens to own land anywhere in the United States. When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's country of origin."

Similarly here, assuming the constitutionality of the asserted exercise of the State's "proprietary" power, the

very statement that this part of the statute can be upheld only under the "police power" constitutes a recognition that it is subject to a more exacting constitutional limitation than the part relating to the State's own waters. And here, in the light most favorable to the State, there is presented a conflict between the State's "right" to exclude ineligible aliens from sharing in its fish, and the right of those aliens to earn their living by fishing on the high seas.

Resolution of that conflict in favor of the individual's constitutional right is, we submit, required even more plainly here than it was in the *Oyama* case. There, the exclusion of ineligible aliens from land ownership was the expressed purpose of the basic prohibition which the Court's opinion assumed to be valid. Here, if we assume the validity of the basic provision barring these aliens from fishing in the State's waters, that exclusion is not the end in itself, but merely a measure which the State, acting as "owner", decrees under the guise of conserving its own property. To permit the extension of that discrimination to the taking of fish which the State does not "own" would mean the compounding of the State's extraordinary power over wild life to a degree that has no conceivable justification, and a corresponding whittling away of the right of aliens to work for a living and hence to reside in the State. Such an inroad upon the rule of *Truax* v. *Raich, supra,* should not be sanctioned.

The brief which has been filed by counsel for the petitioner shows that fishing in waters beyond the State's territorial jurisdiction constitutes a substantial, if not the major, part of the important commercial activity for which petitioner is required to have a license. The State, in its brief in opposition to the petition for certiorari, took the position that under the California statute the Commission could not grant a license limited to fishing on the high seas (pp. 7-8). Accepting that view of the statute, it necessarily follows that the constitutional test applicable to fishing on the high seas is that by which the entire statute

must be judged. No matter what power the State may derive from its "proprietary" interest, that part of the statute which the court below upheld under the "police power" denies to petitioner the equal protection of the laws. Since the State takes the position that the Commission must grant both privileges or neither, we submit that the invalidity of the restriction on fishing on the high seas necessarily condemns also the restriction on fishing in territorial waters.

CONCLUSION

During the recent war the Federal Goverment considered itself forced to take steps which discriminated against persons of Japanese ancestry because of race. Those steps were upheld by this Court solely because of "pressing public necessity." *Korematsu* v. *U. S.*, 323 U. S. 214, 216; *Hirabayashi* v. *U. S.*, 320 U. S. 81. That necessity was found in the fact that the Japanese group had been set apart by just such regulations as are here challenged. This Court said:

> "The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachment to Japan and its institutions" (*Hirabayashi* case, 320 U. S. at p. 98).

The very fact that such steps were undertaken during the emergency of war increases the importance of acting during the time of peace to eliminate the evils which prompted them. The only hope that they may never again be held necessary lies in the encouragement of the process whereby all groups within the United States become a well-integrated part of the population. The classic American approach, embodied in our Constitution, is to open all occupations to all, not to drive one racial, religious or

national group out of some occupations, thereby increasing their concentration in others. This process will be inevitably retarded by legislation which reinforces distinctions between races by creating legal, social and economic patterns in which such distinctions are decisive.

Respectfully submitted,

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